

## § 17.41

(e) Relevant evidence may be excluded if it is privileged under Federal law.

(f) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in settling or attempting to settle a civil money penalty assessment which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the civil money penalty or its amount. Evidence of conduct or statements made in settlement negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness or opposing a contention of undue delay.

(g) The presiding officer may in his or her discretion permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the presiding officer pursuant to § 17.28.

### § 17.41 The administrative record.

(a) The hearing will be recorded and transcribed. Witnesses, participants, and counsel have 30 days from the time the transcript becomes available to propose corrections in the transcript of oral testimony. Corrections are permitted only for transcription errors. The presiding officer shall promptly order justified corrections. Transcripts may be obtained following the hearing from the Division of Dockets Management at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits, and other evidence admitted at the hearing and all papers and requests filed in the proceeding constitute the administrative record for the decision by the presiding officer and the entity designated by the Commissioner of Food and Drugs to decide the appeal, currently the DAB.

(c) The administrative record may be inspected and copied (upon payment of

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a reasonable fee) by anyone unless otherwise ordered by the presiding officer, who shall upon motion of any party order otherwise when necessary to protect trade secrets or confidential commercial information, as defined in § 20.61 of this chapter, information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, or other information that would be withheld from public disclosure under part 20.

### § 17.43 Posthearing briefs.

Any party may file a posthearing brief. The presiding officer shall fix the time for filing such briefs (which shall be filed simultaneously), which shall not exceed 60 days from the date the parties received the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The presiding officer may permit the parties to file responsive briefs. No brief may exceed 30 pages (exclusive of proposed findings and conclusions) unless the presiding officer has previously found that the issues in the proceeding are so complex, or the administrative record is so voluminous, as to justify longer briefs, in which case the presiding officer may set a longer page limit. Proposed findings of fact and conclusions of law shall not exceed 30 pages unless the presiding officer has previously found that the issues in the proceeding are so complex, or the administrative record is so voluminous, as to justify longer proposed findings and conclusions, in which case the presiding officer may set a longer page limit.

### § 17.45 Initial decision.

(a) The presiding officer shall issue an initial decision based only on the administrative record. The decision shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the allegations in the complaint are true, and, if so, whether respondent's actions identified in the complaint violated the law;

(2) Whether any affirmative defenses are meritorious; and

(3) If the respondent is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors that he or she finds in the case.

(c) The presiding officer shall serve the initial decision or the decision granting summary decision on all parties within 90 days after the time for submission of posthearing briefs and responsive briefs (if permitted) has expired. If the presiding officer believes that he or she cannot meet the 90-day deadline, he or she shall notify the Commissioner of Food and Drugs or other entity designated by the Commissioner to decide the appeal of the reason(s) therefor, and the Commissioner or that entity may then set a new deadline.

(d) Unless the initial decision or the decision granting summary decision of the presiding officer is timely appealed, the initial decision or the decision granting summary decision shall constitute the final decision of FDA and shall be final and binding on the parties 30 days after it is issued by the presiding officer.

#### § 17.47 Appeals.

(a) Either the Center or any respondent may appeal an initial decision, including a decision not to withdraw a default judgment, or a decision granting summary decision to the Commissioner of Food and Drugs or other entity the Commissioner designates to decide the appeal. The Commissioner has currently designated the Departmental Appeals Board (DAB) to decide appeals under this part. Parties may appeal to the DAB by filing a notice of appeal with the DAB, Appellate Division MS6127, Departmental Appeals Board, United States Department of Health and Human Services, 330 Independence Ave. SW., Cohen Bldg., rm. G-644, Washington, DC 20201, and the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the presiding officer issues an initial deci-

sion or decision granting summary decision.

(2) The Commissioner or the entity designated by the Commissioner to hear appeals may, within his or her discretion, extend the initial 30-day period for an additional period of time if the Center or any respondent files a request for an extension within the initial 30-day period and shows good cause.

(c) A notice of appeal shall be accompanied by a written brief of no greater length than that allowed for the posthearing brief. The notice must identify specific exceptions to the initial decision, must support each exception with citations to the record, and must explain the basis for each exception.

(d) The opposing party may file a brief of no greater length than that allowed for the posthearing brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief, unless such time period is extended by the Commissioner or the entity designated by the Commissioner to hear appeals on request of the opposing party for good cause shown. Any brief in opposition to exceptions shall be filed with the Division of Dockets Management and the DAB (addresses above).

(e) The appellant may file a reply brief not more than 10 pages in length within 10 days of being served with appellee's brief.

(f) There is no right to appear personally before the Commissioner of Food and Drugs or other entity deciding the appeal (currently the DAB).

(g) The entity deciding the appeal will consider only those issues raised before the presiding officer, except that the appellee may make any argument based on the record in support of the initial decision or decision granting summary decision.

(h) If on appeal the entity deciding the appeal considers issues not adequately briefed by the parties, the entity may ask for additional briefing. However, no such additional briefs will be considered unless so requested.

(i) If any party demonstrates to the satisfaction of the entity deciding the appeal (currently the DAB) that additional evidence not presented at the